160 US 171

RECORD, CASE No. 15,000.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM NO., ~~1526~~. ~~1036~~ ~~976~~ 380

98

PETER DOUGHERTY, PLAINTIFF IN ERROR,

vs.

THE NEVADA BANK OF SAN FRANCISCO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED MARCH 22, 1892.

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No. 12354.

In the Supreme Court of the State of California.

PETER DOUGHERTY, Plaintiff and Appellant,
vs.
THE NEVADA BANK OF SAN FRANCISCO, Defendant and Respondent.

Transcript on appeal from the superior court of San Francisco, department 10.

J. C. Bates, attorney for appellant; W. H. L. Barnes, attorney for respondent.

Filed this 1st day of Oct., 1887.
J. D. SPENCER, *Clerk*,
By BEN. M. MADDUX, *Deputy Clerk*.

1

In the Supreme Court of the State of California.

Transcript on Appeal.

In the Superior Court of the City and County of San Francisco, State of California, Department 10.

PETER DOUGHERTY, Plaintiff,
vs.
THE NEVADA BANK OF SAN FRANCISCO (a Corporation), Defendant.

No. 5933. Late 19th District C't.

Amended Complaint on Street Assessment.

The plaintiff above named complains against the defendant above named and for his cause of action states—

That the said defendant above named is now and has been for ten years last past a corporation duly created and organized
2 under and by virtue of the laws of the State of California, and has its principal place of business in the city and county of San Francisco.

1. That on the 28th day of October, 1872, the board of supervisors of the city and county of San Francisco duly adopted and passed a resolution whereby said board resolved that it was their intention to and thereafter did, on the 25th day of November, 1872, order certain work in said city and county to be done, described as follows, to wit:

That Mason street from Sacramento street to California street be graded.

That on the 15th day of January, A. D. 1873, the superintendent of public streets, highways, and squares of said city and county did enter into a written contract with one George Dougherty to do and perform said work.

2. That said George Dougherty performed and completed said

work under the direction and to the satisfaction of said superintendent prior to the 11th day of April, A. D. 1877, and said superintendent, in his official capacity as such, did, on the said 11th day of April, A. D. 1877, duly make, sign, and issue an assessment to cover the sum due for said work, including incidental expenses, to wit, the sum of $29,054.46.

3. That said assessment briefly referred to said contract made as aforesaid, the work contracted for and performed, and also showed the amount to be paid therefor, together with the incidental expenses, the rate per front foot assessed, the amount of each as-
3 sessment, the name of the owner of each lot assessed when known to said superintendent, and when the name was unknown the word "unknown" was written opposite the number of the lot, the amount assessed against each lot and portion of lot, and the number of each lot and portion of each lot assessed.

4. That said assessment had attached thereto a diagram exhibiting each street and street crossing, lane, alley, place, and court on which said work was done and showing the relative location of each distinct lot and portion of a lot to the work done and numbered to correspond with the numbers in said assessment, and also showing the number of feet frontage assessed for said work contracted for and performed as aforesaid and to which assessment was attached the warrant issued in said case and hereinafter described.

5. That the lot of land No. 1 on said assessment and diagram hereinafter described was assessed on said assessment, as the property of unknown owners, to pay the sum of $7,263.60.

6. That by reason of the law in such cases made and provided said assessment is payable in United States gold and silver coin and the judgment in United States gold coin.

7. That the said defendant, at the time of commencing this action, to wit, on the 25th day of April, 1877, was the owner of certain portions of the lots and lands as aforesaid assessed and sought to be charged with said assessment, and that the lot of land owned by said defendant and assessed as aforesaid is situate in said city and county of San Francisco, State of California, and described as follows, to wit:

4 Commencing on the southwest corner of Sacramento and Mason streets, running thence south along the westerly line of Mason street $137\frac{6}{12}$ feet; thence running at right angles west $137\frac{6}{12}$ feet; thence running at right angles north $137\frac{6}{12}$ feet, and thence running at right angles east $137\frac{6}{12}$ feet to the point of commencement, the same being designated on said assessment and diagram by the No. 1.

8. That on a certain day, to wit, the said 11th day of April, 1877, the said superintendent, as such, duly signed, issued, and delivered a certain warrant, with said assessment and diagram attached, to the said George Dougherty, which said warrant was also countersigned by George F. Maynard, the auditor of said city and county, in his official character as such auditor, and authorized the said George Dougherty, his agents or his assigns, to demand and receive the amount of the assessment so made as aforesaid.

9. That said warrant, diagram, and assessment were on said last-mentioned day all duly recorded by said superintendent, in the office of said superintendent, in a book kept by him for that purpose, viz, in vol. 80, page 49, of Street Assessments, and the record thereof was then duly signed by said superintendent.

10. That afterwards and within ten days after the said 11th day of April, 1877, by virtue of said warrant, one George Comstock, on behalf of and as the agent of J. C. Bates, assignee of said contract, publicly demanded payment of the sum on the said premises so assessed as aforesaid in due manner and form—that is to say, on the 20th day of April, 1877, between the hours of 9 o'clock a. m. and 4 o'clock p. m., the said George Comstock, with such warrant, assessment, and diagram, went upon the said lot and then and there publicly demanded in an audible tone of voice payment of the said sum so assessed thereon, to wit:

On said lot No. 1, the sum of $7,263.60.

11. That the said defendants, though demand has been made as aforesaid for the payment of the said sum of $7,263.60, as aforesaid assessed, have not paid the same or any part thereof.

12. That thereafter and within ten days from the date of said warrant, to wit, on the 20th day of April, 1877, said warrant was returned to said superintendent of public streets, highways, and squares, with a return endorsed thereon, signed by said George Comstock and verified by his oath, stating the nature and character of the demand as aforesaid set forth, and whether any of the said assessments remained unpaid in whole or in part, and the amount thereof so unpaid were fully stated, as also the fact that said sum of money so assessed on the lot of land above described had been demanded as stated aforesaid and still remained wholly unpaid.

13. That thereupon, to wit, on the said 20th day of April, 1877, the said superintendent recorded the said return so made as aforesaid in the margin of the record of said warrant and assessment, and also the original contract referred to therein, at full length in a book kept by him for that purpose in his office, and signed the said record.

14. That defendant's grantor, Charity Hayward, who was then the owner, appealed to said board of supervisors concerning the acts, proceedings, and determinations of said superintendent in relation to the performance and acceptance of said work and the assessment made and issued therefor as aforesaid, and said board, after due notice given as required by law, duly heard said appeal and affirmed said assessment and all the acts of said superintendent.

15. That said sum of $7,263.60 so assessed as aforesaid on said lot of land hereinbefore described has not been paid nor any part thereof, but still remains due and wholly unpaid, with the interest thereon at the rate of one per cent. per month from the 20th day of April, 1877.

16. And said plaintiff further alleges that he has succeeded to said George Dougherty's interest in the said contract and said assessment and warrant issued thereon as hereinbefore stated and all

moneys due and to grow due thereon by assignment in writing in due form.

17. That this action was commenced on the 25th day of April, 1878, by filing a complaint and issuing a summons thereon in the manner prescribed by law.

(1.) Wherefore plaintiff demands judgment for $7,263.60, gold coin, with interest thereon at the rate of one per cent. per month from the 20th day of April, A. D. 1877, and that the same,
7 with interest, costs, and such attorney's fees as allowed by law, be adjudged a lien against the lot of land described aforesaid.

(2.) That a decree in due form may be made for the sale of said premises in the said complaint mentioned, by the sheriff of said city and county, for gold coin of the United States, according to law and the practice of this court, and the proceeds of sale be applied in payment of the amount found due to plaintiff, with costs and attorney's fees and costs of sale.

(3.) That said defendant and all persons claiming under it subsequent to the commencement of this action, either as purchasers, incumbrancers, or otherwise, may be barred and foreclosed of all right, claim, or equity of redemption in the said premises and every part thereof.

(4.) That any party to this suit may become purchaser at such sale.

(5.) That plaintiff be allowed to amend his complaint on the face thereof by inserting the true name of any one sued by a fictitious name or by striking out the names of any person not a proper party thereto.

(6.) And that plaintiff may have such other and further order and relief in the premises as the case may require and as to the court may seem just and equitable.

J. C. BATES,
Attorney for Plaintiff.

(Duly verified February 8th, 1886, and duly served March 5, 1886, and filed March 8th, 1886, by leave of court.)

8 (Title of Court and Cause.)

Answer to Amended Complaint.

Now comes the defendant, by its attorney, W. H. L. Barnes, and for answer to the amended complaint of the plaintiff shows to the court and alleges as follows:

1. Defendant denies upon information and belief that on the 28th day of October, 1872, or at any other time, the board of supervisors of the city and county of San Francisco duly or at all adopted or passed a resolution whereby or at all said board resolved that it was their intention to or thereafter did, on the 25th day of November, 1872, or at any other time, order certain work in said city and county to be done, as described in said amended complaint, or that on the 15th day of January, A. D. 1873, or at any other time, the superin-

tendent of public streets, highways, and squares of said city and county did enter into a written or other contract with one George Dougherty or any one else to do or perform the work described in said amended complaint.

2. Defendant denies upon information and belief that the said George Dougherty performed or completed said work under the direction or to the satisfaction of said superintendent or otherwise prior to the 11th day of April, A. D. 1877, or any other date, or that said superintendent, in his official capacity as such or otherwise, did, on the said 11th day of April, A. D. 1877, or at any other time, duly or at all make, sign, or issue an assessment to cover the
9 sum due for said work, including incidental expenses or any other assessment, amounting to the sum of $29,054.46, or any other sum.

3. Defendant denies upon like information and belief that said assessment briefly or at all referred to said contract made as alleged in said complaint or otherwise, the work contracted for or performed, or also or at all showed the amount to be paid therefor, together with the incidental or other expenses, the rate per front or any other foot assessed, the amount of each or any assessment, the name of the owner of each or any lot assessed when known to said superintendent, or when the name was unknown the word "unknown" or any other word was written opposite the number of the lot, the amount assessed against each or any lot or portions of lot, or the number of each or any lot or portion of each or any lot assessed.

4. Defendant denies upon like information and belief that said assessment had attached thereto a diagram exhibiting each or any street or street crossing, lane, alley, place, or court on which said or any work was done, or showing the relative or other location of each or any district or other lot or portion of a lot to the work done or otherwise, or numbered to correspond with the numbers in said assessment, or also or at all showing the number of feet frontage assessed for said or any work contracted for or performed, as alleged in said complaint or otherwise, or to which or any assessment was attached the warrant issued in said or any case, as in said complaint thereinafter or at all described.

10 5. Defendant denies upon like information and belief that the lot of land No. 1 or any other number on said or any assessment or diagram, in said complaint thereinafter or at all described, was assessed on said or any assessment as the property of "unknown" or other owners to pay the sum of $7,263.60, or any other sum.

6. Defendant denies upon like information and belief that by reason of the law in such cases made or provided or otherwise said assessment is payable in United States gold or silver coin, or the judgment in the United States gold coin.

8. Defendant denies upon like information and belief that on the 11th day of April, 1877, or at any other day, the said superintendent as such or otherwise duly or at all signed, issued, or delivered a certain or any warrant, with said or any assessment or diagram attached, to the said George Dougherty, or that said warrant

was also or at all countersigned by George F. Maynard, the auditor of said city and county, in his official capacity as such auditor or otherwise, or authorized the said George Dougherty, his agents or his assigns, or either of them, to demand or receive the amount of the assessment so made as alleged in said complaint or otherwise.

9. Defendant denies upon like information and belief that said warrant, diagram, or assessment were on said last-mentioned day or any other day, all or either of them, duly or at all recorded by said superintendent, in the office of the said superintendent, in a book kept by him for that purpose, viz., in vol. 80, page 49, of
11 Street Assessments, or the record thereof was then or ever duly or at all signed by said superintendent.

10. Defendant denies upon like information and belief that afterwards or within ten days after the said 11th day of April, 1877, or at any other time, by virtue of said warrant or otherwise, one George Comstock or any other person on behalf of or as the agent of J. C. Bates or any other person as assignee of said contract or otherwise publicly or at all demanded payment of the sum on the said premises so assessed as aforesaid or otherwise, in due or any manner or form, as alleged in said complaint or otherwise.

11. Defendant denies upon like information and belief that thereafter or at all or within ten days from the date of said warrant, on the 20th day of April, 1877, or at any other time, said warrant was returned to said superintendent of public streets, highways, and squares, with a return endorsed thereon or otherwise signed by said George Comstock or any other person, or verified by his or any other person's oath, stating the nature or character of the demand as set forth in said complaint or otherwise, or whether any or all of said assessments remained unpaid in whole or in part, or that the amount thereof so or at all unpaid were fully or at all stated, as also or at all the fact that said or any sum of money so or at all assessed on the lot of land described in said complaint had been demanded, as stated in said complaint or otherwise, or still remained wholly or at all unpaid.

12 13. Defendant denies upon like information and belief that on the 20th day of April, 1877, or at any other time, said superintendent recorded the said return so or at all made as aforesaid or otherwise in the margin of the record of said warrant or assessment, or also or at all the original contract referred to therein at full or any length in a book kept by him for that purpose in his office, or signed the said record.

15. Defendant denies that said sum of $7,263.60 or any other sum so or at all assessed on said lot of land described in said complaint or otherwise remains due, with interest thereon at the rate of one per cent. per month or any other rate from the 20th day of April, 1877, or any other date.

16. Defendant denies upon information and belief that said plaintiff has succeeded to said George Dougherty's interest in said contract or said assessment or warrant issued thereon, as in said complaint stated or otherwise, or all or any moneys due or to grow due thereon, by assignment in writing in due form or otherwise.

And for a further and separate answer and defense to the cause of action in said amended complaint contained defendant shows to the court and alleges as follows:

That said board of supervisors never had authority or jurisdiction to order the work described in the complaint to be done.

That there never was any notice of intention in form of a resolution or any notice at all describing the work set forth in the complaint adopted or passed by said board of supervisors or signed by
13 the clerk of the board of supervisors or published for a period of ten or any number of days or at all, or published in the paper doing the printing under the law for street work or in two (2) daily newspapers, one as a morning edition and one as an evening edition.

And for a further and separate answer and defense to the cause of action in said amended complaint contained defendant shows to the court and alleges as follows:

That the alleged contract under which plaintiff claims that George Dougherty performed the work of grading said part of Mason street from Sacramento to California streets, as set forth in the amended complaint herein, is and was from the 20th day of July, 1873, null and void; that the time for the performance of said work had elapsed, and said contract was on said date forfeited and abandoned by said Dougherty, and that there was no foundation for any assessment thereon.

That thereafter and on the 29th day of March, 1875, the board of supervisors of the city and county of San Francisco wrongfully and without authority of law granted by resolution to the said Dougherty an extension of time upon his said alleged contract so forfeited and abandoned as aforesaid of 645 days from the date of the expiration of the former time granted by said board, and provided that in no event should the same extend the time for a period to exceed thirty days from the date of the passage of said resolution.

That said time so wrongfully and unlawfully extended as aforesaid expired on the 28th day of April, 1875.

14 That on the 31st day of May, 1875, said board of supervisors wrongfully and without authority of law again granted by resolution to the said George Dougherty an extension of time upon his said alleged contract so forfeited and abandoned as aforesaid of 100 days from the date of the expiration of the former time granted by said board; that said time so wrongfully and unlawfully extended as aforesaid expired on the 6th day of August, 1875.

That on the 23d day of August, A. D. 1875, said board of supervisors wrongfully and without authority of law again granted by resolution to the said George Dougherty an extension of time upon his said alleged contract so forfeited and abandoned as aforesaid of 100 days from the date of the expiration of the former time granted by said board; that said time so wrongfully and unlawfully extended as aforesaid expired on the 15th day of November, 1875.

That on the 8th day of November, 1875, said board of supervisors wrongfully and without authority of law again granted by resolution to the said George Dougherty an extension of time upon his said

alleged contract so forfeited and abandoned as aforesaid of 100 days from the date of the expiration of the former time granted by said board; that said time so wrongfully and unlawfully extended as aforesaid expired on the 23d day of February, 1876.

That on the 14th day of February, 1876, said board of supervisors wrongfully and without authority of law again granted by
15 resolution to the said George Dougherty an extension of time upon said alleged contract so forfeited and abandoned as aforesaid of 50 days from the date of the expiration of the former time granted by said board; that said time so wrongfully and unlawfuliy extended as aforesaid expired on the 14th day of April, 1876.

On the 8th day of May, 1876, said board of supervisors wrongfully and without authority of law again granted by resolution to the said George Dougherty an extension of time upon said alleged contract so forfeited and abandoned as aforesaid of 100 days from the date of the expiration of the former time granted by said board and provided in said resolution that said extension was granted upon the express condition that in case of the failure of the said George Dougherty to complete said work within the time named in said resolution no further extension of the time should be granted; that said time so wrongfully and unlawfully extended as aforesaid expired on the 23d day of July, 1876.

That on the 14th day of November, 1876, said board of supervisors wrongfully and without authority of law again granted by resolution to the said George Dougherty an extension of time upon said alleged contract so forfeited and abandoned as aforesaid of 150 days from the date of the expiration of the former time granted by said board; that said time so wrongfuliy and unlawfully extended as aforesaid expired on the 20th day of December, 1876; that on the 8th day of January, 1877, said board of supervisors
16 wrongfully and without authority of law again granted by resolution to the said George Dougherty an extension of time upon said alleged contract so forfeited and abandoned as aforesaid of 95 days from the date of the expiration of the former time granted by said board; that said time so wrongfully and unlawfully extended as aforesaid expired on the 20th day of December, 1876.

That on the 5th day of March, 1877, said board of supervisors wrongfully and without authority of law again granted by resolution to the said George Dougherty an extension of time upon said alleged contract so forfeited and abandoned as aforesaid of 45 days from the date of the expiration of the former time granted by said board; that said time so wrongfully and unlawfully extended as aforesaid expired on the 10th day of May, 1877.

That said extensions were wholly unauthorized and void and a fraud upon the property-owners affected thereby and upon this defendant, and by reasons of the premises said superintendent had no jurisdiction, power, or authority to make the supposed assessment in said complaint alleged or to in any manner charge or incumber the land or any part of the land in said complaint described, and

said board of supervisors had no power or authority to revive said abandoned contract.

Wherefore defendant demands that the plaintiff take nothing by his said complaint, and that defendant do have and recover of plaintiff its costs herein incurred.

W. H. L. BARNES,
Attorney for Defendant.

(Duly verified, served, and filed May 17th, 1886.)

17 (Title of Court and Cause.)

Findings.

In this case I make and file the following findings of fact and conclusions of law:

That on or about the 15th day of January, 1873, S. J. Ashley, the superintendent of public streets, highways, and squares of said city and county of San Francisco, did, in his official capacity, and not otherwise, enter into a contract with George Dougherty, in the pleadings herein named, for performance of the work mentioned and described in the assessment in the complaint alleged, which work was to be performed within one hundred and fifty days from the making of said contract; that said Dougherty did not perform the work in said contract agreed to be performed within the time therein limited therefor or within the time extended for the performance thereof, and said Dougherty did abandon performance of the work under said contract.

As a conclusion of law, the court finds that the defendant is entitled to judgment, and judgment is hereby ordered in favor of the defendant for his costs herein, and that plaintiff take nothing by this action.

Dated San Francisco, January 13th, A. D. 1887.

WALTER H. LEVY, *Judge.*

(Duly filed January 14, 1887.)

18 (Title of Court and Cause.)

Judgment.

This cause came on regularly for trial, J. C. Bates, Esq., appearing as counsel for the plaintiff, and W. H. L. Barnes, Esq., for the defendant.

A trial by jury having been expressly waived by the counsel for the respective parties, the cause was tried before the court sitting without a jury.

Whereupon witnesses on the part of plaintiff and defendant were duly sworn and examined, and certain documentary evidence having been introduced, the evidence being closed, the cause was submitted to the court for consideration and decision, and, after due deliberation thereon, the court delivers its findings and decision in writing, which is filed, and orders that judgment be entered in accordance therewith.

Wherefore, by reason of the law and findings aforesaid, it is ordered, adjudged, and decreed that Peter Dougherty, plaintiff, take nothing by this his action as against The Nevada Bank, defendant, but that judgment be, and the same is hereby, entered herein in favor of said defendant.

It is further ordered, adjudged, and decreed that said Nevada Bank, defendant, recover of and from said Peter Dougherty, plaintiff, its (said defendant's) costs and disbursements incurred in this action and amounting to the sum of $18.00.

Costs reduced to $9.00, as per stipulation filed January 19th, 1887.

Judgment recorded January 14th, 1887. B. 4, p. 56, d. 4.

19 (Title of Court and Cause.)

Notice of Motion for New Trial.

You will please take notice that the plaintiff herein intends to move the court to vacate and set aside the decision heretofore made in the above-entitled action and to grant a new trial thereof on the following grounds:

(1.) Insufficiency of the evidence to justify the decision, and that the same is against law.

(2.) Errors in law occurring at the trial and excepted to by said plaintiff.

Said motion will be made and based upon the papers, records, and files in said cause and a bill of exceptions to be hereafter settled and filed.

Yours, etc.,

J. C. BATES,
Attorney for Plaintiff.

Dated January 22, A. D. 1887.

To the defendant and W. H. L. Barnes, Esq., its attorney.

(Duly served and filed January 22, 1887.)

(Title of Court and Cause.)

Plaintiff's Settled Bill of Exceptions.

Be it remembered that this cause came on regularly for trial before the court (a jury trial having been duly waived) on the 11th day of January, A. D. 1887, J. C. Bates appearing for plaintiff and W. H. L. Barnes, Esq., for the defendant.

20 Plaintiff's counsel stated that all the allegations in amended complaint (except the facts that defendant was a corporation, the owner of the lot of land described in amended complaint, and that defendant's grantor while the owner appealed to the board of supervisors from the acts of the superintendent in regard to the assessment, and that said board heard the appeal and decided the case) were denied by the answer thereto.

Attorney for defendant then stated his case, reading the decision in case of Dougherty *vs.* Coffin, 10 P. R., 672.

The plaintiff, to maintain the issues on his part, offered and read

in evidence, first proving the signatures to the assignments genuine, the assessment, diagram, warrant, return, contract, specifications, and assignments of contract set forth in the amended complaint; to which the defendant's counsel then and there objected as irrelevant and immaterial and no foundation laid for the introduction of the same.

The objections were overruled and the defendant's counsel then and there duly excepted; and thereupon said documents were read in evidence and are in words and figures following, to wit:

Assessment.

STATE OF CALIFORNIA, } *ss:*
City and County of San Francisco, }

Assessment made and issued this eleventh day of April, A. D. 1877, for street improvements made in said city and county, to wit:

21 For grading Mason street from Sacramento to California street, as per contract made with George Dougherty on the fifteenth day of January, A. D. 1873, $26{,}368\frac{53}{100}$ cubic yards of grading @ $\$1\frac{10}{100}$ $29,005 38

Printing, $\$11\frac{8}{100}$; engineering, $38 ..... 49 08

$29,054 46

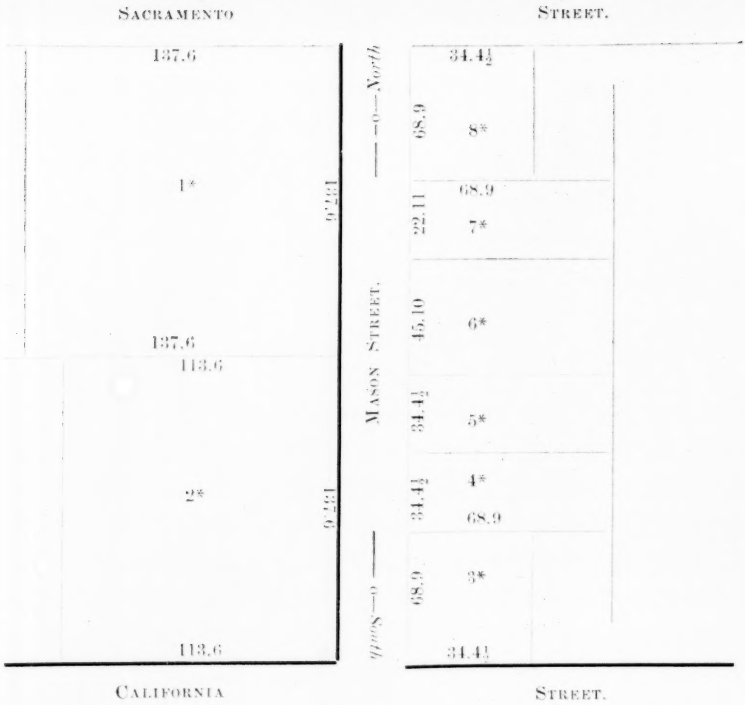
Number of front feet assessed, 550.
Rate per front foot, $52.8262.

Lots Numbered and Exhibited on the Diagram Hereto Attached.

Nos.	Names of owners.	Feet front.	By whom paid.	Amount.
1	Unknown..	137^{6}	.....	$7,263 60
2	Unknown..	137^{6}	Paid by Hibernia bank	7,263 60
3	Unknown..	68^{9}	.....	3,631 80
4	Unknown..	$34^{4\frac{1}{2}}$	.....	1,815 90
5	Unknown..	$34^{4\frac{1}{2}}$	.....	1,815 90
6	Unknown..	45^{10}	.....	2,421 20
7	Unknown..	22^{11}	.....	1,210 60
8	Unknown..	68^{9}	.....	3,631 80
		550		$29,054 40

(Signed) JOHN HAGAN,
Superintendent of Public Streets, &c.

22 DIAGRAM.



Explanation.

The figures on this diagram in black represent feet and fractions of feet, and those in red the numbers of the lots.

(Signed) JOHN HAGAN,
Superintendent of Public Streets, Highways & Squares.

Warrant.

By virtue hereof I, John Hagan, superintendent of public streets, highways, and squares of the city and county of San Francisco and State of California, by virtue of the authority vested in
23 me as superintendent of public streets, highways, and squares, do authorize and empower George Dougherty, his agents or assigns, to demand and receive the several assessments upon the

*In red ink in copy.

assessment and diagram hereto attached, and this shall be his warrant for the same.

San Francisco, April 11, A. D. 1877.

JOHN HAGAN,
Superintendent of Public Streets, Highways, & Squares.

Countersigned by—

GEO. F. MAYNARD,
Auditor of the City and County of San Francisco.

Return.

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

George Comstock, being duly sworn, deposes and says that he is the agent of J. C. Bates, the assignee of the contract of George Dougherty, the original contractor named in the annexed assessment and warrant; that since the date of said warrant, to wit, on the 20th day of April, A. D. 1877, and with and by virtue thereof as such agent, he went upon each of the lots of land exhibited on the diagram attached to the said assessment and warrant and numbered thereon respectively 1, 2, 3, 4, 5, 6, 7, 8, and while on said lots, on said day, in an audible tone of voice, between the hours of 9 o'clock a. m. and 4 o'clock p. m., he publicly demanded on each lot of land the payment of the sum or sums assessed to each in the said assessment respectively:

On	said	lot	No. 1	the sum of	$7,263.60.
On	"	lot	No. 2	" " "	7,263.60.
On	"	lot	No. 3	" " "	3,631.80.
On	"	lot	No. 4	" " "	1,815.90.
On	"	lot	No. 5	" " "	1,815.90.
On	"	lot	No. 6	" " "	2,421.20.
On	"	lot	No. 7	" " "	1,210.60.
On	"	lot	No. 8	" " "	3,631.80.

But that, notwithstanding such demands so made, the several sums assessed in the said assessment and demanded as aforesaid against the said lots, exhibited and numbered as aforesaid, remain due and unpaid.

GEO. COMSTOCK.

Subscribed and sworn to before me this 20th day of April, A. D. 1877.

JAMES L. KING,
Notary Public.

(Endorsed:) Recorded this 11th day of April, 1877, in vol. 80, page 49. John Hagan, superintendent public streets, highways, and squares, per W. H. Horton, deputy.

Returned this 20th day of April, 1877, and return recorded in vol. 80, page 49.

JOHN HAGAN,
Superintendent Public Streets, Highways, and Squares,
Per W. H. HORTON, *Deputy.*

Street contract No. 5311.
Award No. 3727, N. S.

25 This agreement, made and entered into this 15th day of January, A. D. 1873, by and between George Dougherty, of the city and county of San Francisco, State of California, party of the first part, and S. J. Ashley, superintendent of public streets, highways, and squares of the city and county of San Francisco, State of California, under and by virtue of the authority granted to him as such by an act entitled "An act amendatory of article IV of an act entitled 'An act to repeal the several charters of the city of San Francisco, to establish the boundaries of the city and county of San Francisco, and to consolidate the government thereof,' approved the 19th day of April, 1856, repealing sections thirty-six to sixty-four, inclusive, and all acts and parts of acts amendatory and supplementary thereof and substituting this act for said article IV," and under and by virtue of the several acts amendatory thereof and supplementary thereto, party of the second part:

Whereas the said party of the first part (as by reference to the record of the proceedings of the board of supervisors of said city and county on the 6th day of January, A. D. 1873) has been awarded the contract for the work hereinafter mentioned:

Now, therefore, these presents witnesseth: That the said party of the first part, for the consideration hereinafter mentioned, promises and agrees with S. J. Ashley as said superintendent, and not otherwise, that he will do and perform or cause to be done and performed in a good and workmanlike manner, under the direction and

26 to the satisfaction of the said superintendent, and furnish the necessary materials required for the execution and completion thereof, all the work to be performed by grading Mason street from Sacramento to California street, in the said city and county of San Francisco, according to the specifications hereunto annexed and made a part of this contract; and the said S. J. Ashley, acting in his official capacity as said superintendent and not individually, promises and agrees that on the performance of the covenants aforesaid by the said party of the first part he will duly make and issue an assessment and attach a certificate thereto, as provided for in the aforementioned acts, for the expenses of the work aforesaid at the following prices in the gold or silver coin of the United States, to wit, grading, per cubic yard, $1.10.

And it is further mutually agreed between the parties hereto that eight hours shall constitute a legal day's work for all work done by any person employed by said party of the first part in performing this contract, and said party of the first part further agrees not to require any person so employed to work longer than eight hours during each day.

And it is agreed and expressly understood by the parties to this agreement that in no case (except where it is otherwise provided in the acts aforementioned and referred to) will the said city and county of San Francisco be liable for any portion of the expense of the work aforesaid nor for any delinquency of the persons or property assessed, nor shall the said S. J. Ashley, said superintend-
27 ent, nor his sureties or bondsmen be liable or holden for the payment of any sum or sums for the above-mentioned work, nor for any delinquency on his own part, nor of the persons or property assessed.

In witness whereof the parties to these presents have hereunto set their hands and seals the day and year first herein mentioned.

GEO. DOUGHERTY. [SEAL.]
S. J. ASHLEY, [SEAL.]
Superintendent of Public Streets, Highways, & Squares.

Signed, sealed, and delivered in the presence of—
M. M. BALDWIN.

Award No. 3727.

Specifications for Grading Mason Street from Sacramento to California.

The above-named portion of Mason street is to be graded to the official height and line, and the roadway when completed to have a proper crown to the center from the bottom of the gutter-ways.

The work to be commenced within six (6) days and completed within one hundred and fifty (150) days from the date of the contract.

GEO. DOUGHERTY.
S. J. ASHLEY,
Superintendent of Public Streets, Highways, & Squares.

Assignment of Street Contract No. 5311, Award No. 3727, for Grading Mason Street from California Street to Sacramento Street.

For value received I, Geo. Dougherty, party of the first part to the annexed contract, do hereby assign, transfer, and make over to J. C. Bates, of the city and county of San Francisco, State of
28 California, his heirs or assigns, all my right, title, claim, and interest as contractor in and to the said within contract and the assessment-list and warrant to be issued pursuant thereto; and the said J. C. Bates, his heirs or assigns, — hereby authorized and empowered to receive from the superintendent of public streets, highways, and squares the above-named assessment-list and warrant, and to demand, collect, and receive the several sums of money to be assessed and become due thereon for his sole use and benefit forever.

In witness whereof I have hereunto set my hand and seal this 22d day of December, A. D. 1876.

(Signed) GEO. DOUGHERTY. [SEAL.]

Attest: J. BUNTING.

Street contract No. 5311.

Award No. 3727.

For value received I, J. C. Bates, the assignee of George Dougherty, the party of the first part to the contract above referred to, do hereby assign, transfer, and make over to Peter Dougherty, his heirs or assigns, all my right, title, claim, and interest in and to said contract and all my interest in the assessment and warrant issued for the money due for the performance of the work referred to in said contract and all the moneys remaining due and unpaid on said assessment.

In witness whereof I have hereunto set my hand and seal this 22d day of June, A. D. 1877.

J. C. BATES. [SEAL.]

I consent to above assignment.

GEORGE DOUGHERTY.

29 On the foregoing evidence plaintiff rested his case.

The defendant, to maintain the issues on its part, read in evidence from the records of the board of supervisors of the city and county of San Francisco pertaining to the work described in amended complaint for grading Mason street from Sacramento to California street, in the city and county of San Francisco:

(1.) Resolution of intention, No. 3485, N. S., duly passed and adopted October 28, 1872, and the proof of due publication thereof.

(2.) Resolution ordering said work, No. 3596, N. S., duly passed November 25, 1872.

(3.) Notice for bids for said work, dated November 30, 1872, in due form of law, which required the work to be completed within 150 days from the signing of the contract.

(4.) Resolution of award for said work to George Dougherty, No. 3727, N. S., duly adopted January 6, 1873.

(5.) Contract set forth in the amended complaint, dated January 15, 1873, and hereinbefore inserted in full.

(6.) Resolution No. 4192, N. S., duly adopted June 9, 1873, authorizing superintendent of public streets, highways, and squares of said city and county to grant to George Dougherty an extension of ten days on contract to grade Mason street from Sacramento to California street.

(7.) Resolution No. 4218, N. S., duly adopted and passed June 16, 1873, granting 10 days on said contract.

30 (8.) Resolution No. 4237, N. S., duly adopted and passed June 23, 1873, granting said George Dougherty 10 days on said contract.

(9.) Resolution No. 4277, N. S., duly adopted July 7, 1873, granting said George Dougherty 10 days on said contract.

(10.) Resolution No. 7124, N. S., duly adopted and passed March 29, 1875, authorizing and directing superintendent of public streets, highways, and squares to grant to George Dougherty or his assigns 645 days to grade Mason street from California to Sacramento: Provided that the extension herein granted shall date from the expira-

tion of the former time granted by this board, but shall in no event extend the time for a period to exceed 30 days from the date of the passage of this resolution.

(11.) Resolution No. 7376, N. S., duly adopted and passed May 31, 1875, granting said George Dougherty 100 days on said contract.

(12.) Resolution No. 7739, N. S., duly adopted and passed August 23, 1875, granting said George Dougherty 100 days on said contract.

(13.) Resolution No. 8064, N. S., duly adopted and passed November 8, 1875, granting said Geo. Dougherty 100 days on said contract.

(14.) Resolution No. 8343, N. S., duly adopted and passed February 14, 1876, granting George Dougherty 50 days on said contract.

(15.) Resolution No. 8774, N. S., duly adopted and passed May 8, 1876, granting George Dougherty 100 days on said contract.

This extension being granted on the express condition
31 that in case of the failure of said George Dougherty to complete said work within the time named no further extension of time shall be granted.

(16.) Resolution No. 9816, N. S., duly adopted and passed November 14, 1876, granting George Dougherty 150 days on said contract.

(17.) Resolution No. 10091, N. S., duly adopted and passed January 8, 1877, granting George Dougherty 95 days on said contract.

(18.) Resolution No. 10336, N. S., duly adopted and passed March 5, 1877, granting 45 days on said contract to said George Dougherty, making 1,425 days of extension, besides the 150 days given in contract.

The defendant then offered and read in evidence the extensions made by said superintendent of public streets, highways, and squares, annexed to said contract, dated January 15, 1873, whereby the superintendent extended the time for the respective number of days ordered by said resolutions Nos. 4192, 4218, 4237, 4277, 7124, 7376, 7739, 8064, 8343, 8774, 9816, 10091, 10336.

To which plaintiff's counsel duly objected as irrelevant and immaterial and inadmissible under the pleadings, as defendant's grantor, Charity Hayward, while admittedly the owner of said lot of land, appealed to the board of supervisors from the acts of said superintendent in regard to the performance and acceptance of said work, and that said appeal was heard and decided by said board in favor of said assessment, as alleged in subdivision 14 of amended complaint. The court overruled said objections, and plaintiff then and there duly excepted.

32 The plaintiff also objected to reading in evidence said resolutions of the board extending the time as irrelevant and immaterial, and that they constituted no defense to this assessment and contract, which were valid under the law as existing and construed by the supreme court when extensions — made and assessment issued, to wit, Taylor *vs.* Palmer, 31 Cal., 246, and that any subsequent decision overruling said case impaired the obligation of plain-

tiff's contract and was unconstitutional and void under the Constitution of the United States, and also in violation of the XIVth article of amendment to the Constitution of the United States, and that plaintiff's claims, rights, privileges, and immunities under the Constitution of the United States — in this, that said contract and extensions of time and the assessment, when made, were valid by the laws of the State of California, as then expounded by all the departments of the Government and administered in its courts of justice, and the validity and obligation thereof cannot be impaired by subsequent decision of the State courts altering the construction of the law, under and on faith of which contractor in good faith acted and relied.

The court overruled said objections, and plaintiff's counsel then and there duly excepted.

The defendant read in evidence further proceedings from the board of supervisors in words and figures as follows:

"OFFICE OF THE SUPERINTENDENT OF STREETS,
SAN FRANCISCO, *September* 23, 1872.

To the honorable board of supervisors:

33 GENTLEMEN: I would most respectively recommend the following street improvements: That Mason street from Sacramento street to California street be graded.

S. J. ASHLEY,
Sup't of Public Streets, Highways, and Squares."

"SAN FRANCISCO, *November* 4, 1872.

To the honorable the board of supervisors of the city and county of San Francisco.

GENTS: Your committee on streets, etc., to whom was referred various petitions, protests, etc., beg leave to report as follows, viz: In favor of grading Mason street from Sacramento to California.

Respectfully submitted.

STEWART MENZIES,
S. P. TAYLOR,
Committee."

"To the honorable the board of supervisors of the city and county of San Francisco.

GENTS: We, the undersigned owners of property on Mason street between Sacramento and California streets, respectfully request your honorable body not to grant any further time on the contract with George Dougherty for grading Mason street between California and Sacramento streets, dated January 15, 1873, for the following reasons:

His contract time was for 150 days, after the expiration of which time he was granted four different extensions of time. Then
34 the board of supervisors refused to grant him any further time. After his contract had ceased to exist for 613 days, on March 29, 1875, the then board of supervisors granted an extension on the

contract for 643 days, which was intended to go back 613 days. He has in addition received three more extensions of 290 days, and now he is applying for 100 days further time from your honorable body, which we respectfully request you will not grant. And your petitioners will ever pray.

(Signed) T. GIBLIN, 91 11/12 feet on Mason street.
D. C. McGLYNN, 68 9/12 feet on Mason St.
CHARLOTTE SCHMITZ, 34 4/12 feet on Mason St.

Filed February 14, 1876."

"To the honorable the board of supervisors of the city and county of San Francisco.

GENTLEMEN: We, the undersigned owners of property on Mason street between California and Sacramento streets, respectfully request your honorable body not to grant any further time on the contract for grading Mason street between California and Sacramento made with George Dougherty January 15, 1873, over three years ago, for the following reasons:

His contract time was for 150 days. Since then he has received extensions at nine different times, amounting in all to 1,023 days further time. The last extension of 50 days time, granted by your honorable body on February 14, 1876, expired very nearly a month ago. He is now applying for a further extension, which we most respectfully request your honorable body not to grant, as it will involve us and probably the city in a lawsuit if you should grant him further time, as we consider that his contract does not exist on account of the last extension of time having expired.

And your petitioners will ever pray.

Dated San Francisco, May 1, 1876.

(Signed) T. GIBLIN, 91 8/12 feet front.
D. C. McGLYNN, 68 9/12 feet.
MRS. C. SCHMITZ, 34 feet 4 inches.

Filed in office of board of supervisors May 1, 1876."

"To the honorable the board of supervisors of the city and county of San Francisco:

GENTLEMEN: We, the undersigned owners of property on Mason street between California and Sacramento streets, respectfully request your honorable body not to grant any further time on the contract for grading Mason street between California and Sacramento streets made with George Dougherty on January 15, 1873 (near four years ago), for the following reasons:

The work has not been prosecuted with due diligence. Messrs. Stanford and Hopkins have had a large force of men and teams taking out rock for the purpose of using on the improvement of their property without cost to the contractor.

"The contract was entered into to be completed in 150 days from January 15, 1873. Since then the time has been extended eleven

different times, making 1,173 days further time, which ex-
36 pired on December 9, 1876 (provided all the extensions granted were legal). The contractor is now asking for a further extension, which, if granted, is likely to involve us, as well as the city, in a lawsuit.

The amount that will be assessed under the contract will be equal to a confiscation of our property, as it is not worth the assessment under the contract price. Our property is damaged in place of being benefited by said grading.

By granting our request your petitioners will ever pray.

D. C. McGLYNN, $68\frac{9}{12}$ feet frontage on Mason.
T. GIBLIN, $91\frac{8}{12}$ feet frontage on Mason.
A. HAYWARD, for R. G. SNEATH, $137\frac{6}{12}$ feet frontage on Mason.

Filed January 6, 1877."

"To the honorable the board of supervisors of the city and county of San Francisco:

GENTS: Your committee on streets, wharves, grades, and public squares, to whom were referred various petitions, protests, etc., respectfully report thereon as follows: * * * Also adverse to protest against granting a further extension of time on contract to grade Mason street between California and Sacramento streets.

(Signed) J. C. ROBERTS.
FLEET F. STROTHER.

"Extract from report of street committee read and adopted at the meeting of the board of supervisors held January 15, 1877."

37 "*Appeal from Assessment.*

"To the honorable the board of supervisors of the city and county of San Francisco:

"The undersigned, owners of property named in the assessment, warrant, and diagram issued by the superintendent of streets on the 11th day of April, 1877, to George Dougherty or assigns, in the matter of the grading of Mason street between Sacramento and California streets, in this city and county, hereby appeal to the board of supervisors therefrom, and state the following as the grounds of such appeal:

"First. The said assessment, warrant, and diagram give to the contractor compensation for at least one-third more excavation in cubic yards than were excavated by said contractor, at least so much of said work having been done by private parties for their own convenience and use, and not by said contractor.

"Second. That on the 15th day of January, 1873, pursuant to resolution of award No. 3727 of your honorable body, adopted January 6, 1873, George Dougherty contracted to do the work mentioned in said resolution; that said contractor obtained extensions of time to complete his contract down to July 17, 1873; that from July 17, 1873, to March 29, 1875, said contractor obtained no further exten-

sion, and that said contract was abandoned by him during this interval, and the same was terminated by his failure to complete said work and the refusal of your honorable body to grant him further extensions.

38 "That the act of the board of supervisors had on March 29, 1875, by which 643 days from the date of said Dougherty's last extension of time was given him, so as to fill the whole of the period in which said contract had been abandoned, and give the contractor thirty days further time in which to complete his work, was illegal and void.

"That there have been other extensions given said contractor since the last-named extension, at times when said contractor was in default, and had thereby abandoned his contract.

"Third. That said contract was assigned to J. C. Bates, Esq., on the 22d of December, 1876; that since said last-named date said J. C. Bates has had no extension of time granted him as such assignee; that the same have, notwithstanding said assignment, been granted to said George Dougherty.

"Fourth. That said assessment, warrant, and diagram are issued to said George Dougherty as of April 11, 1877, and not the real party in interest, J. C. Bates.

"Dated San Francisco, April 23, 1877.

"(Signed) D. C. McGLYNN.
"CHARITY HAYWARD,
"By W. H. L. BARNES,
"*Her Attorney, and*
"T. GIBLIN.
"JOHN A. RUSSELL, *Clerk.*

"Filed April 24, 1877."

39 "*Notice of Appeal.*

"Resolution No. 10664 (new series).—Whereas D. C. McGlynn, Charity Hayward, and T. Giblin, by petition, filed on the 24th day of April, 1877, have appealed from the assessment of the superintendent of public streets and highways for the cost of grading Mason street from California to Sacramento street, setting forth that said assessment gives to the contractor compensation for at least one-third more excavation in cubic yards than were excavated by said contractor, and for other reasons:

"Now, therefore, resolved, and it is ordered, that public notice be given by publication of this resolution for five days to all parties interested in said work or the assessment therefor to be and appear before the board of supervisors of the city and county of San Francisco, at their chambers, in the city hall, on Monday afternoon, May 21st, at four o'clock, to show cause (if any they have) why the said assessment shall not be modified, corrected, or a new assessment ordered to be made in conformity with *and* the prayer of the petitioners.

"And the clerk is hereby directed to advertise this resolution, as required by law.

"In board of supervisors, San Francisco, May 14th, 1877.
"Adopted by the following vote:
"Ayes—Supervisors Edwards, Bryan, Wise, Eaton, Hayes, Strother, Boyce, Gibbs.
40 "Absent—Supervisors Drucker, Shine, Roberts, Macdonald.
JOHN A. RUSSELL, *Clerk.*"

(Duly advertised according to law.)

Defendant then offered and read in evidence extract from minutes of the board of supervisors' meeting of July 23d, 1877, Book A, No. 23, page 31, as follows:

"The appeal of D. C. McGlynn, Charity Hayward, and T. Giblin from the assessment for the cost of grading Mason street from Sacramento to California streets laid over at a prior meeting was taken up. Mr. James H. Dane appeared for appellants and J. C. Bates for respondent. William S. Horton and John Ward were sworn and examined; whereupon a motion by Supervisor Roberts, that the assessment be confirmed, was carried."

The defendant offered and read in evidence the following:

"To the honorable the board of supervisors of the city and county of San Francisco.

"GENTS: D. C. McGlynn, Charity Hayward, and T. Giblin, by W. H. L. Barnes, their attorney, hereby protest against the confirmation of the assessment this day passed by your honorable board, on the ground that it declined to hear the testimony of the appellants, and on the further ground that the board has no power to
41 issue subpœnas for the compulsory attendance of witnesses.
"San Francisco, July 23, 1877.
"W. H. L. BARNES,
"*Attorney for D. C. McGlynn, Charity*
"*Hayward, and T. Giblin.*"

The plaintiff then called J. C. Flood, who, being duly sworn, testified that he was president of the corporation defendant; that when the property was purchased in 1873 of Charity Hayward, the owner, an agreement or bond of indemnity was executed to defendant, dated June 26, 1873, which I have with me under subpœna to produce the same. The signature thereto is genuine, and it is in words and figures following, to wit:

"Whereas Charity Hayward, wife of Alvinza Hayward, has agreed to sell and convey to 'The Nevada Bank of San Francisco' all that certain parcel of land situate in the city and county of San Francisco, State of California, known and designated upon the official map of said city as fifty-vara lot number five hundred and ninety-eight (598), free and clear of all charges, encumbrances, taxes, and street assessments;

"And whereas there is an assessment against said parcel of land for the grading of Mason street from Sacramento to California street amounting to the sum of seven thousand two hundred and sixty-

three $\frac{60}{100}$ dollars in United States gold coin, with the interest thereon allowed by law, the validity of which assessment is contested and disputed by said Charity and Alvinza Hayward;

"And whereas 'The Nevada Bank of San Francisco' afore-
42 said, in consideration of the premises and agreements upon the part of said Alvinza Hayward hereinafter made 'The Nevada Bank of San Francisco' aforesaid, is willing to allow said Charity and Alvinza Hayward or either of them to contest and litigate the validity of said assessment:

"Now, therefore, know all men by these presents that in consideration of the premises and the sum of ten dollars to him in hand paid by 'The Nevada Bank of San Francisco,' receipt whereof is hereby acknowledged, said Alvinza Hayward is held and firmly bound unto 'The Nevada Bank of San Francisco,' its successors and assigns, in the sum of fourteen thousand five hundred and forty-seven $\frac{20}{100}$ dollars, gold coin of the United States; for the payment of which unto 'The Nevada Bank of San Francisco,' well and truly to be made, he hereby binds himself, his heirs, executors, and administrators, firmly by these presents.

"The condition of the foregoing obligation is such that if said Alvinza Hayward shall at all times save and hold the 'Nevada Bank of San Francisco' aforesaid, its successors and assigns, harmless and free from all loss, damage, or liability arising or to arise out of the non-payment of said assessment or any part thereof, then these presents shall be void; otherwise the same shall remain in full force and effect.

"In witness whereof the said Alvinza Hayward hereunto sets his hand and seal this 26th day of February, A. D. 1878.

"ALVINZA HAYWARD."

43 Plaintiff offered and asked leave to read the same in evidence for the purpose of showing that defendant had nothing to lose in case judgment passed for plaintiff.

The defendant objected as irrelevant and immaterial.

The court sustained the objection; to which ruling plaintiff then and there duly excepted.

The plaintiff called George Dougherty, who, being duly sworn, said that he was present before the board of supervisors on the hearing of the appeal of Charity Hayward *et al.* on the 23d day of July, 1877, J. C. Bates appearing for contractor and W. H. L. Barnes, Esq., for Mrs. Hayward and others.

Q. Did not the appellant Charity Hayward, on the hearing of said appeal, by her attorney and counsel, admit that the extensions of time for performing said contract were regularly granted, and did not said appellants there and then waive any and all irregularities in regard to the time of performance of said work, and in effect waive all objections as to the time of performing said work?

The defendant's counsel objected as immaterial and irrelevant. The court sustained the objection, and plaintiff then and there duly excepted.

Defendant's counsel then asked said witness when said work was actually finished and contract completed.

Plaintiff's counsel objected as incompetent and not the best evidence, as the superintendent of public streets was the one to decide when contract — performed, and the record kept of that was the best evidence.

44 On the foregoing evidence the case was submitted and judgment ordered for defendant, and on the 14th day of January, 1887, the court filed its findings and decision in said cause in writing, and upon which judgment was duly entered the 14th day of January, 1887.

Errors of Law.

The plaintiff hereunder specifies the errors of law occu-ring at the trial and excepted to by the plaintiff:

(1.) The court erred in admitting in evidence the extensions on said contract and annexed thereto by superintendent of public streets, highways, and squares for the reason that paragraph 14 of amended complaint, taken as true for want of a denial, conclusively estopped defendant from questioning any act or proceeding of said superintendent in the premises.

(2.) The court erred in ruling and deciding that the law as expounded by the supreme court in case Taylor *vs.* Palmer, 31 Cal., 246, and in force and administered in all the departments of the Government, when work — performed under contract and assessment made, was changed by the cases of Beveridge *vs.* Livingston, 54 Cal., 54, and Dougherty *vs.* Coffin, 10 P. R., 672, and thus impair the obligation of said contract relied upon by contractor.

(3.) The court erred in ruling and deciding that by reason
45 of extensions not being granted before time elapsed the contractor thereby abandoned his contract.

(4.) The court erred in ruling and deciding that said defendant's grantor was not estopped or bound by her deliberate action of appealing to the proper tribunal for relief and not allowing George Dougherty, the contractor, to testify in support of the record offered in evidence by defendant and of the decision of the board of supervisors on appeal.

(5.) The court erred in not allowing the bond of A. Hayward to be read in evidence.

(6.) The court erred in not finding on all the material issues in amended complaint.

(7.) The assessment, warrant, diagram, and return set forth in amended complaint and read in evidence by plaintiff with the assignments of contract *prima facie* proves all proceedings of superintendent and board of supervisors regular, and the court erred in ruling and deciding said contract impaired and annulled when the contractor had in good faith relied upon the law as expounded by the supreme court of California in Taylor *vs.* Palmer, 31 Cal., 246.

(8.) The contract was made, extensions granted, and assessment issued between the dates of the decision of Taylor *vs.* Palmer, 31

Cal., 246, and Beveridge *vs.* Livingston, 54 Cal., 54, and the validity and obligation could not be impaired by subsequent decision of the court of the State altering the construction of the law, and the court erred in ruling and deciding contrary thereto.

46 I hereby certify that the foregoing bill of exceptions is correct, and that the same has been served and settled according to law.

Dated February 2, A. D. 1887.

WALTER H. LEVY, *Judge.* [SEAL.]

J. C. BATES,
Attorney for Plaintiff.

(Correctly engrossed.)

J. C. BATES,
Attorney for Plaintiff.
W. H. L. BARNES,
Attorney for Defendant.

January 28, 1887.

(Endorsed:) Filed February 2, 1887. Wm. J. Ruddick, clerk, by A. J. Raisch, deputy clerk.

(Title of Court and Cause.)

Order Denying Motion for New Trial.

This cause came on regularly to be heard this day upon a motion for a new trial, J. C. Bates, Esq., appearing as counsel for the plaintiff. There being no appearance by or on behalf of the defendant, after counsel was heard the cause, on said motion, was thereupon submitted to the court for consideration and decision; and now, the court having fully considered the same, it is ordered that the said motion be, and the same is hereby, denied.

(Entered in the minutes of court February 14, 1887.)

47 (Title of Court and Cause.)

Notice of Appeal.

You will please take notice that the plaintiff in the above-entitled action hereby appeals to the supreme court of the State of California from the judgment entered and recorded in said superior court on the 14th day of January, A. D. 1887, in said action in favor of the defendant and against said plaintiff and from the whole thereof; and also from the order made and entered in the minutes of said court in said action on the 14th day of February, A. D. 1887, refusing and denying said plaintiff's motion for a new trial.

Dated April 13, A. D. 1887.

Yours, etc.,

J. C. BATES,
Attorney for Plaintiff.

To the clerk of said superior court and W. H. L. Barnes, Esq., attorney for defendant.

(Endorsed:) Service by copy of the within notice of appeal is hereby admitted this 13th day of April, A. D. 1887. W. H. L. Barnes, attorney for defendant. Filed April 13, 1887. Wm. J. Ruddick, clerk, by A. J. Raisch, deputy clerk.

Certificate.

I, Wm. J. Ruddick, county clerk of the city and county of
48 San Francisco, State of California, and *ex officio* clerk of the superior court in and for the said city and county, hereby certify that I have compared the foregoing transcript with the original papers in the above-entitled action now on file in my office and with the orders therein made and entered on the minutes of said court, and that the said transcript is correct.

I further certify that a sufficient undertaking on appeal in due form of law was, on the 13th day of April, A. D. 1887, properly filed in said cause.

In witness whereof I have hereunto set my hand and affixed the seal of said superior court this 28th day of September, A. D. 1887.

[SEAL.] WM. J. RUDDICK, *Clerk*,
By L. J. WELCH, *Deputy Clerk*.

48½ Service and receipt of a copy hereof is admitted this 29th day of September, A. D. 1887.

W. H. L. BARNES,
Attorney for Respondent.

49 In the Supreme Court of the State of California, Department Two.

PETER DOUGHERTY, Appellant, *vs.* THE NEVADA BANK OF SAN FRANCISCO, Respondent. } No. 12354. On Appeal from the Superior Court in and for the City and County of San Francisco.

This is an action to enforce a street assessment for grading a part of Mason street between California and Sacramento streets, in San Francisco. Judgment went for defendant and plaintiff appeals.

The court finds that the contract was made on January 15, 1873; that the work was to be performed within 150 days from the making of the contract, and that the work was not performed within that time or within any time extended for its performance. There were attempts to extend the time years after its expiration; but, as before held by this court, such attempts were futile.

50 The contract was made under the statute of 1871–'72, and the case is on all fours with the case of Dougherty *vs.* Coffin, 69 Cal., 454.

There is nothing in the point that the court failed to find on some minor issues. Having found against appellant as above stated,

the other matters were entirely immaterial. It would make no difference which way they found.

Judgment and order denying a new trial affirmed.

McFARLAND, *J.*

We concur:

SHARPSTEIN, *J.*
THORNTON, *J.*

I, L. H. Brown, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of an opinion filed November 7th, 1889, in the above-entitled cause, as shown by the records of my office.

Seal Supreme Court of California.

Witness my hand and the seal of the court this 8th day of December, A. D. 1891.

L. H. BROWN, *Clerk*,
By GEO. A. McCALVY,
Deputy Clerk.

[Endorsed:] Dougherty *v.* Nevada Bank. Copy of opinion.

51 In the Supreme Court of the State of California, Department Two.

PETER DOUGHERTY, Appellant, *vs.* THE NEVADA BANK OF SAN FRANCISCO, Respondent. } No. 12354. On Appeal from the Superior Court in and for the City and County of San Francisco.

And now, at this day, this cause being called and having been heretofore submitted and taken under advisement and all and singular the law and premises having been fully considered, the opinion of the court herein is delivered by McFarland, J.

We concur.

SHARPSTEIN, *J.*
THORNTON, *J.*

Whereupon it is now considered, ordered, adjudged, and decreed by the court here that the judgment and order of the superior court in and for the city and county of San Francisco in the above-entitled cause be, and the same are hereby, affirmed.

I, L. H. Brown, clerk of the supreme court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause on the 7th day of November, 1889, and now remaining of record in my office.

Witness my hand and the seal of the court affixed at my office this 8th day of December, A. D. 1891.

[Seal Supreme Court of California.]

L. H. BROWN, *Clerk*,
By GEO. A. McCALVEY, *Deputy.*

52 [Endorsed:] Copy. No. 12354. In the supreme court, State of California. Remittitur. Peter Dougherty *vs.* The Nevada Bank of Calif.

Clerk's costs $15 00
Paid by appellant $15 00
Paid by respondent .....

Total $15 00

L. H. BROWN, *Clerk*,
By GEO. A. McCALVEY, *Deputy*.

53 In the Supreme Court of the State of California.

PETER DOUGHERTY, Plaintiff and Appellant,
vs.
THE NEVADA BANK OF SAN FRANCISCO (a Corporation), Defendant and Respondent.

Petition for Writ of Error.

To the Honorable Wm. H. Beatty, the chief justice of the supreme court of the State of California:

Your petitioner, Peter Dougherty, the plaintiff and appellant in the above-entitled cause, respectfully represents that on the 7th day of November, A. D. 1889, judgment and decision was rendered in this action by the supreme court of California affirming the judgment of the superior court of the city and county of San Francisco in favor of defendant and against the appellant.

That thereafter, to wit, December 7th, A. D. 1889, said judgment became final under the constitution and laws of the State of California, and on the 8th day of December, 1889, remittitur was issued in said cause to the superior court of the city and county of San Francisco, from whence the appeal was taken.

That there was drawn in question in said cause the validity of a statute of the State as construed and relied upon by plaintiff on the ground of being repugnant to the Constitution and laws of the United States, and the decision of the court in this case is in favor of the validity of the statute and construction thereof on contracts prior to the construction thereof.

That your petitioner claims title, right, privilege, and immunity under the Constitution of the United States, as appears
54 by the record in this case; that the obligation of the contract set forth in the transcript on appeal herein was valid at the time the assessment sued on was made, to wit, April 11th, 1877, as the statute under which the work was done and extension of time granted was construed and expounded by the supreme court of the State of California in Taylor *vs.* Palmer, 31 Cal., 246, and that the decision in this case is against the right, privilege, and immunity set up and claimed by the plaintiff and appellant in this case under the Constitution and authority of the United States; that the obligation of the contract of your petitioner has been impaired by the State of California.

That the assessment in this case when it was made was valid under the laws then in force and as construed by the highest court of said

State and was founded on a valid contract, and said contract or obligation thereof could not be impaired by the State or any authority of the State.

That the decision and final judgment of the said supreme court in said cause is against the right and immunity claimed by plaintiff and appellant, your petitioner, and on the said 7th day of December, A. D. 1889, became and was final and ever since and now remains and is in full force and effect; that the said supreme court is the highest court of law or equity in said State of California in which said cause could have been decided.

That the right and immunity so claimed by your petitioner were and are guaranteed, confirmed, and secured to your petitioner under the Constitution and laws of the United States.

That in and by the said decision of said supreme court of California herein manifest error hath happened, to the great damage of your petitioner, the appellant in said cause.

Wherefore your petitioner, the said appellant, respectfully petitions and prays that a writ of error be allowed in said cause, and that the same be taken upon and pursuant to the said writ of
55 error to the Supreme Court of the United States for correction of the aforesaid error; that a citation to the above-named respondent upon and pursuant to the said writ of error be signed by the honorable the chief justice of the said supreme court of the State of California.

J. C. BATES,
Attorney for Petitioner.

Dated December 7th, A. D. 1891.

56 [Endorsed:] In the supreme court of the State of California. Peter Dougherty, plaintiff and appellant, *vs.* The Nevada Bank of San Francisco (a corporation), defendant and respondent. Copy. Petition for writ of error. Filed Dec. 7th, 1891. *Filed Dec. 7th, 1891.* L. H. Brown, clerk, by Geo. A. McCalvy, dep'ty. J. C. Bates, attorney for petitioner, 434 California St., San Francisco.

57 In the Supreme Court of the United States.

PETER DOUGHERTY, Plaintiff in Error,
vs.
THE NEVADA BANK OF SAN FRANCISCO (a Corporation), Defendant in Error.

I, L. H. Brown, clerk of the supreme court of the State of California, do hereby certify that the foregoing fifty-six (56) printed and written (48 printed and 9 written) pages, numbered 1 to fifty-six (56), inclusive, are a full, true, and correct copy of the record and of all proceedings in the therein-entitled cause, and that the same together constitute the return to the annexed writ of error in said cause. The original writ of error, with bond, is annexed to copy of this record.

And I further certify that at the time said writ of error was filed

in the office of the clerk of said court the plaintiff in error lodged with me, as clerk of said court, in said office, a copy of said writ of error for the defendant in error in said cause.

Witness my hand and the seal of the said supreme court this 15th day of March, A. D. 1892.

[Seal Supreme Court of California.]

L. H. BROWN, *Clerk*,
By GEO. A. McCALVY,
Deputy Clerk.

58 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the justices of the supreme court of the State of California, Greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said supreme court, before you, between Peter Dougherty, plaintiff and plaintiff in error, and The Nevada Bank of San Francisco (a corporation), defendant and defendant in error, in which suit was specially set up and claimed by plaintiff in error rights and immunity under the Constitution and laws of the United States, and also wherein was drawn in question the validity of a statute of the State and the impairment of the obligation of contracts, and that the decision of the supreme court of California was against the said right, immunity, and privilege so claimed, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, at the city of Washington, in the District of Columbia, together with this writ, so that you have the same at the said city of Washington, in the District of Columbia, on the second Monday of October next, in the said United States Supreme Court to be then and there held, that, the record and proceedings aforesaid be- inspected, the said United States Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 7th day of December, in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of the United States the one hundred and 16th.

Seal U. S. Circuit Court, Northern Dist. Cal.

L. S. B. SAWYER,
Clerk U. S. Circuit Court, Northern District of California.

The above writ of error is hereby allowed.

W. H. BEATTY,
Chief Justice of the Supreme Court of Cala.

59 The within writ of error was presented to me at my chambers too late on the day it bears date to admit of an examination of the petition and record on that day. Having now examined the same and the statutes and decisions referred to in the petition and being of the opinion that the petitioner should have an opportunity of being heard upon the matters stated in his petition in the Supreme Court of the United States, I have this day allowed said writ *nunc pro tunc* as of the 7th day of December, 1891, and the clerk is directed to file the same as of that date.

De ember 31, 1891.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

[Endorsed:] United States Supreme Court. Peter Dougherty, plaintiff & pl'ff in error, *vs.* The Nevada Bank of San Francisco, a corporation, def't & def't in error. Original writ of error. Filed by the direction of the chief justice as of December 7th, 1891, 3.25 p. m. L. H. Brown, clerk, by D. S. Culp, deputy.

60 *Proof of Service of Citation Annexed.*

STATE OF CALIFORNIA, } *ss:*
City and County of San Francisco, }

Samuel H. Batten, being duly sworn, deposes and says that he is now and at all the times hereinafter mentioned was a male citizen of the United States, over the age of twenty-one years, and not a party to or interested in the above or within entitled action.

That on the 20th day of January, A. D. 1892, this deponent served the annexed citation upon The Nevada Bank of San Francisco (a corporation), named in said citation as defendant in error, and upon W. H. L. Barnes, the only attorney of record in the State supreme court for said defendant, The Nevada Bank of San Francisco (a corporation).

That said services were made by this deponent personally on said day, in the city and county of San Francisco, by delivering to and leaving with said W. H. L. Barnes, as such attorney, a copy of said citation, and by delivering to and leaving with I. W. Hellman, president of said corporation, a copy of said citation.

SAM'L H. BATTEN.

Subscribed and sworn to before me this 22nd day of January, A. D. 1892.

[Seal George T. Knox, Notary Public, City & County San Francisco.]

GEO. T. KNOX,
Notary Public.

61 UNITED STATES OF AMERICA, *ss:*

To the Nevada Bank of San Francisco (a corporation), Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washing-

ton, in the District of Columbia, on the 10th day of October, A. D. 1892, pursuant to a writ of error which has been allowed and filed in the office of the supreme court of the State of California, wherein Peter Dougherty is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Wm. H. Beatty, chief justice of the supreme court of the State of California, this 31st day of December, A. D. 1891, and of the Independence of the United States the one hundred and sixteen.

Seal Supreme Court of California.

W. H. BEATTY,
Chief Justice of the Supreme Court of California.

62 [Endorsed:] In the supreme court of the State of California. Peter Dougherty, plaintiff in error, *vs.* The Nevada Bank of San Francisco (a corporation), defendant in error. Citation. Filed Jan'y 22, 1892. L. H. Brown, clerk, by P. V. Long, deputy.

Service of within citation by copy admitted this twentieth day of January, A. D. 1892.

——— ———,
Attorney for the Nevada Bank of San Francisco (a Corporation), Defendant in Error.

63 *Bond.*

In the Supreme Court of the United States.

PETER DOUGHERTY, Plaintiff in Error,
vs.
THE NEVADA BANK OF SAN FRANCISCO (a Corporation), Defendant in Error.

Know all men by these presents that we, J. W. Taylor and S. S. Cohn, both of the city and county of San Francisco, State of California, are held and firmly bound unto The Nevada Bank of San Francisco (a corporation), defendant in error, in the sum of five hundred (500) dollars, lawful money of the United States of America, to be paid to the said corporation, The Nevada Bank of San Francisco; to the payment of which, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 8th day of December, A. D. 1891.

Whereasthe above-named Peter Dougherty has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered by the supreme court of the State of California in the cause entitled Peter Dougherty, plaintiff, *versus* The Nevada Bank of San Francisco (a corporation), defendant:

Now, therefore, the condition of this obligation is such that if the

above-named Peter Dougherty, plaintiff in error, shall prosecute his said writ of error to effect and answer all costs if *they* shall fail to make good *their* plea, then this obligation shall be void; otherwise to remain in full force and virtue.

64 J. W. TAYLOR. [SEAL.]
S. S. COHN. [SEAL.]

Signed, sealed, and delivered in the presence of—
JOHN P. POOLE.

UNITED STATES OF AMERICA, }
District of California, } *ss:*

J. W. Taylor and S. S. Cohn, being duly sworn, each for himself deposes and says that he is a resident and freeholder in said district and is worth the sum of five hundred (500) dollars, in lawful currency of the United States of America, exclusive of property exempt from execution and above all debts and liabilities.

J. W. TAYLOR.
S. S. COHN.

Subscribed and sworn to before me this 8th day of December, A. D. 1891.

[Seal John P. Poole, Notary Public, San Francisco County, Cal.]

JOHN P. POOLE,
Notary Public.

Approved Dec'r 31, 1891.

W. H. BEATTY,
Chief Justice Supreme Court of California.

Filed Dec. 31st, 1891.

L. H. BROWN, *Clerk,*
By GEO. A. McCALVY, *Deputy.*

65 [Endorsed:] In the Supreme Court of the United States. Peter Dougherty, plaintiff in error, *vs.* The Nevada Bank of San Francisco (a corporation), defendant in error. Bond on writ of error. The within undertaking is approved December —, A. D. 1891. —— ——, chief justice of the supreme court of the State of California. J. C. Bates, attorney for plaintiff in error, 434 California St. S. F.

Endorsed on cover: Case No. 15,000. California supreme court. Term No., 1526. Peter Dougherty, plaintiff in error, *vs.* The Nevada Bank of San Francisco. Filed March 22, 1892.

FILED.
OCT 3 1893
JAMES H. McKENNEY,
CLERK.

RECORD, CASE NO. 15000.

Supreme Court of the United States,

OCTOBER TERM, 1893.

Term No. 76 98

PETER DOUGHERTY, PLAINTIFF IN ERROR,

vs.

THE NEVADA BANK OF SAN FRANCISCO, DEFENDANT IN ERROR.

Motion of Plaintiff in Error to Advance Case on Docket

J. C. BATES,
Attorney for Plaintiff in Error.

Supreme Court of the United States.

PETER DOUGHERTY,
Plaintiff in Error,

vs.

THE NEVADA BANK OF SAN FRANCISCO
(a Corporation),
Defendant in Error.

Brief on Motion of Plaintiff in Error to Advance Case on Docket.

The plaintiff in error herein, on the sixteenth of June, 1893, served on the defendant in error written notice of motion to advance this case on the calendar, or to submit case on briefs on file, which motion, with proof of service, is herewith filed.

I.

STATEMENT OF MATTER INVOLVED.

The question presented for consideration by the record in this case is that of the impairment of the obligation of a contract by the State of California by change of judicial construction of the statute law forming a beneficial part of plaintiff's contract. (Trans., pages 24 and 25, folios 44 and 45.)

That is, the Supreme Court of California, in 1866, in the case of *Taylor* vs. *Palmer*, 31 Cal., 246 (plaintiff's brief herein, pages 11 and 12), construed Section 7 of the Law (pages 2 and 3 plaintiff's brief), providing for executing the contract and fixing and extending the time to perform the work in regard to improvement of streets in the City and County of San Francisco, to the effect that the power could be exercised *after* the expiration of the time fixed in the contract had expired, under said Section 7, and such construction was followed and relied upon for some sixteen years, and until the decision in the case of *Beveridge* vs. *Livingstone*, 54 Cal., 54, (decided last of

1879), which overruled said decision of *Taylor* vs. *Palmer* in that regard, and a different construction was there given said section of the law forming a very important part of plaintiff's contract, and *such* construction was also given a *retroactive effect* and operation on plaintiff's contract and all contracts for street work entered into and fully performed between 1866 and 1879.

The brief of plaintiff in error, on file herein, more fully gives the facts of the case and the authorities we rely on to sustain our contention on the merits.

II.

Reason for Application.

1. The reason this application is made to advance the case is indicated in the affidavit before referred to.

The reason there given to have this case advanced, briefly stated, is, that by reason of the change in the construction of the law forming "*part of the evidence of indispensable conditions to the right of the city to levy the tax*" *or assessment* (31 Cal., 475), and giving such construction *retroactive operation* on the contract in this case and hundreds of others fully performed prior to decision in *Beveridge* vs. *Livingstone*, 54 Cal., 54, hundreds of thousands of dollars will be totally lost by delay, as many of the contracts are too small to justify bringing the case to this Court.

The contract in this case and scores of others valid under the construction of the law in *Taylor* vs. *Palmer*, 31 Cal. 246, when entered into and completely performed under faith of stability in such construction as to the past, at least, were annulled by change in the construction of the law (54 Cal., 54), in overruling *Taylor* vs. *Palmer* and giving it a retroactive effect on the past as if *Taylor* vs. *Palmer* had never been decided.

Beveridge vs. *Livingstone*, 54 Cal., 54, followed in 69 Cal., 455, and this case followed the last (81 Cal., 162, Trans., page 26), so that there is no hope left for us in the Supreme Court of California, and this was brought here as a test case to have the question presented on our Bill of Exceptions (Trans., page 24, folios 44–45), passed upon by this Court, as to whether rights under contracts can be destroyed and the obligations of contracts impaired by the State of California by such change in the construction of the law by the judicial department of the State government.

The Act of 1871–72 (Stats. 1871-72, page 804), referred to in the opinion contained in the record in this case, was only a re-enactment

of the same law construed in *Taylor* vs. *Palmer*, 31 Cal., 246, which, under rule of decision in California as well as other States, "was a legislative adoption of the known construction of the same provision."

In re Baker & Hamilton, 55 Cal., 303;
Blythe vs. *Ayers*, 96 Cal., 591;
Cooley on Const. Lim., 6th ed., page 66;
Low vs. *Blanchard*, 116 Mass., 274.

If we have to wait for this case to be reached in its order, many cases now pending involving the same question will have to be tried, and the expense incurred of bringing the same to this Court; or we must suffer them to be dismissed for want of prosecution, and then all hope will be gone forever.

Believing that the ends of justice will be subserved by having the case speedily disposed of, we ask, for the reasons hereinbefore given, to have the case advanced on the calendar for this term of Court, as we are willing to argue the case orally the first opportunity the Court can give us, or to submit the case on our briefs on file without oral argument, and the defendant cannot be prejudiced by an early hearing.

2. There is another reason for having the case decided at an early day, and that is, the Supreme Court of California has gone so far (*Brady* vs. *Burke*, 90 Cal., 1) as to allow judgments, pronounced during the sixteen years that the rule of construction of the law given in *Taylor* vs. *Palmer* was the law of the land, to be attacked collaterally when such judgments offered in evidence in support of title, on the ground that the evidence necessary to support the assessment lien, viz: the contract became void under the rule in *Beveridge* vs. *Livingstone* and its retroactive operation, and leaves title to real estate, founded on judgments of foreclosure of street assessments, uncertain and of little value.

We think this case, involving such questions, far exceeds in importance ninety-five per cent. of the cases decided by the Supreme Court of California for the last two years, and, for the reasons above stated, we respectfully ask that the case be heard early in this term of Court.

Respectfully submitted.

J. C. BATES,
Attorney for Plaintiff in Error.